No. 83-355

In The

Supreme Court of the United States

October Term, 1983

DWIGHT J. HOLTER AND SANDRA A. HOLTER, individually and on behalf of others similarly situated,

Petitioners,

vs.

MOORE AND COMPANY, WILLIAM M. MOORE, individually, and TIMOTHY M. MILLER, individually, and on behalf of a class composed of all other sales associates of Moore and Company acting as real estate agents for sellers of residential properties,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

James M. Lyons
(Counsel of Record)
James R. Everson
Rothgerber, Appel & Powers
Attorneys for Respondents
1600 Broadway, 24th Floor
Denver, Colorado 80202
Telephone: (303) 861-2600

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COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTIONS PRESENTED FOR REVIEW

Respondents submit that the following issues are more accurately those presented for review than those contained in the Petition:

1. Whether for purposes of Section 1 of the Sherman Act, 15 U. S. C. § 1, a real estate sales company is capable of combining or conspiring in restraint of trade with its own real estate sales agents in light of the undisputed facts concerning that relationship and in light of the statutory requirements imposed on that relationship by the Colorado Real Estate Brokers and Salesmen's Licensing Act, C. R. S. § 12-61-101, et seq. (1973).

2. Whether Colorado real estate sales companies can, under the Sherman Act, by contractual arrangement control the percentage and amount of commissions received by its own independent contractor sales agents for participating in sales of residential real estate in light of the undisputed facts concerning that relationship and in light of the statutory requirements imposed by the Colorado Real Estate Brokers and Salesmen's Licensing Act, C. R. S. § 12-61-101, et seq. (1973).

3. Whether the direct benefit exception to the general rule that a corporation is incapable of conspiring with its officers and agents is applicable where the only independent personal stake possessed by such an agent is a claim to a percentage of the commission received by the corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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OPINIONS BELOW

The opinion of the Court of Appeals has been reported at 702 F. 2d 854 (10th Cir. 1983) and at 1983-1 Trade Reg. Rep. CCH (¶ 65, 286) and the opinion of the District Court has not been reported but is set out in Appendix A to the Petition herein.

JURISDICTION

Respondents agree with Petitioners' jurisdictional statement.

STATUTE INVOLVED

Respondents agree that this case involves Section 1 of the Sherman Act, 15 U. S. C. § 1.

STATEMENT OF THE CASE

1. Nature of the Case

Respondents agree with Petitioners' statement of the nature of the case.

2. Jurisdiction of the Trial Court

Respondents admit that the Trial Court had jurisdiction pursuant to 28 U. S. C. § 1337(a).

3. Undisputed Facts for Purposes of Summary Judgment Motion

Respondents agree with the undisputed facts contained in the Petition. The Trial Court accepted as true all statements of fact raised by Petitioners and therefore there were no issues of fact which would preclude summary judgment as a matter of law.

REASONS FOR DENYING THE WRIT

1. The Trial Court and the United States Court of Appeals Applied Colorado State Law in Reaching Their Decision

Petitioners' entire position is fabricated upon their assertion that the independent contractor sales agents of Moore and Company are not "employees" for antitrust purposes and thereby outside the general rule that a corporation cannot conspire with its officers, employees, or agents. *See, Nelson Radio & Supply Co. v. Motorola,* 200 F. 2d 911 (5th Cir. 1952). *See also, Card v. National Life Insurance Co.,* 603 F. 2d 828 (10th Cir. 1979); *American Oil Co. v. McMullin,* 508 F. 2d 1345 (10th Cir. 1975); and *Shoenberg Farms v. Denver Milk Producers,* 231 F. Supp. 266 (D. Colo. 1964).[1]

The Court below relied heavily on Colorado law in reaching its decision:

> We conclude that the agents should be considered employees of Moore for antitrust purposes (Pet. App. B, P. 59). . . . The starting point in this case is the law of Colorado under which the parties operate. . . . In this case, however, we look to state law as it actually limits the independence of sales agents from Moore. . . .
>
> Our judgment is that the Colorado statutory scheme restricts the independence of the agents so much that they must be considered 'employees' under Section 1 of the Sherman Act. The Colorado provisions simply do not allow the agents to take any independent course of action that would be competitive with Moore. (Pet. App. B, pp. 56-57).

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[1] Representative cases applying the general rule are cited in the appendix attached hereto as Appendix 1 along with citation to articles discussing this subject.

The Court below further relied upon the Colorado Supreme Court's interpretation of the relationship:

> Thus, when the components of the relationship are examined individually and collectively, we agree with the Colorado Supreme Court that the Colorado real estate laws require Moore and its agents to maintain 'an employer-employee relationship because it [not only] clothes the broker . . . with the right to control his salesmen but also charges him with a duty to do so.' *Faith Realty & Development Co. v. Industrial Comm'n.*, 170 Colo. 215, 460 P. 2d 228, 230 (1969).

(Pet. App. 58.) It is clear from even a cursory review of the opinion of the Court below that both Colorado statutes and case law were instrumental in the decision rendered. For this Court to reverse, it would necessarily have to reverse both the Trial Court and the Tenth Circuit's interpretation of Colorado law. It has long been the established rule of this Court that it will defer to a lower federal court's interpretation of state law. *See, e. g., Bishop v. Wood,* 426 U. S. 341, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976); *Cort v. Ash,* 22 U. S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975); *Gooding v. Wilson,* 405 U. S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972).

Deference to a lower federal court's opinion of the law of the state in which they sit is even more compelling in the instant case where an opinion of the Colorado Supreme Court, *Faith Realty & Development Co. v. Industrial Comm'n.*, 170 Colo. 215, 460 P. 2d 228 (1969), was instrumental in influencing that decision. A similar situation was recently presented to the Court in *Energy Reserves Group, Inc. v. The Kansas Power and Light Co.*, 51 U. S. L. W. 4106, 4111 (1983), where this Court held:

> The Kansas Supreme Court's further holding in this case that these particular governmental price escalator clauses were insufficient to escalate the gas price is *an interpretation of state law to which, of course, we defer.* *Id.* at 4111. (Emphasis added.)

A ruling in favor of the Petitioners herein would be tantamount to a reversal of the Colorado Supreme Court which has held that real estate agents are employees of a real estate broker under Colorado law. It is submitted that this Court should deny Petitioners' request for a Writ because the remedy sought necessarily involves an interpretation of state law which has already been determined by the highest court of the State of Colorado in a manner adverse to Petitioners' position.

In order for this Court to grant the Petition for a Writ of Certiorari, Supreme Court Rule 17 requires a finding that "there are special important reasons" for granting the Writ of Certiorari. As stated in *Rice v. Sioux City Cemetery*, 349 U. S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955):

> But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants. 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic.

Id. at 901. The interpretation by the Court below of Colorado case law and statutes does not rise to a showing of "special and important reasons" that would justify this Court's review. It is submitted that deference to the Court below's interpretation of state law in and of itself justifies denying Petitioners' request herein.

2. There are no Inconsistencies as to the Antitrust Conspiracy Standards.

Petitioners confuse potentially inconsistent results reached by the circuits with an inconsistent legal standard. Only where the circuits have applied inconsistent legal standards should the Court grant a Petition for Writ of Certiorari. The cases cited by Petitioners do not reveal differing legal standards, but merely different results reached from divergent fact patterns. A review of those cases shows that where the legal standard has been discussed, the Courts have looked to the economic reality of the facts to determine whether there are two separate economic entities to allow a finding of plurality as required by Section 1 of the Sherman Act, 15 U. S. C. § 1.

Petitioners' reliance on *Albrecht v. Herald Co.*, 390 U. S. 145, 19 L. Ed. 2d 998 (1968) is woefully misplaced. *Albrecht, supra,* has nothing to do with the intra-corporate conspiracy issue, nor did it enunciate any specific legal standard. Instead, *Albrecht* is a resale price maintenance case that involved Herald Co.'s efforts to impose their predetermined resale prices upon independent carriers who bought the papers at wholesale and sold them at retail.

The facts in *Poller v. Columbia Broadcasting System, Inc.*, 368 U. S. 464, 7 L. Ed. 2d 458 (1962) also show that it did not involve any legal standard different from that applied by the Court below. The Court was not considering an alleged conspiracy within a corporate organization, but rather a completely independent actor who was not part of the CBS organization for purposes of determining whether in economic reality a single business enterprise was involved.

In *North American Soccer League v. National Football League*, 670 F. 2d 1249 (2d Cir. 1982) *cert. denied* — U. S. —, 103 S. Ct. 499, 74 L. Ed. 2d 639 (1983), the court applied an economic reality test in finding that pro football teams are essentially independent entities even though part of a le[illegible] That case differs markedly from the undisputed facts herein and offers no support for the position of Petitioners.

All of the cases cited by Petitioners show that it is a factual question for the Court to determine whether economic reality justifies a finding of two separate entities. Here, the Court below, based on undisputed facts, concluded that there was one entity, Moore and Company, and that its sales agents are in fact employees in the context of the plurality requirement of Section 1 of the Sherman Act, 15 U. S. C. § 1. There is no conflict between the Circuits, only differing results based on differing facts.

Petitioners' attempt to find solace in the granting of review in *Copperweld Corp. v. Independence II Corp., cert. granted*, — U. S. —, 51 U. S. L.W. 3893 (1983) No. 82-1260 is misplaced. That case involves the issue of a parent and its wholly owned subsidiary. The standard which the court applies in *Copperweld* could be very different from the factual context of the instant case, where the Colorado statutes and case law were necessarily an integral part of the decision of the Court below. The Court's review in *Copperweld, supra,* would be made more difficult and less clear if it were asked to include review of the disparate factual context of the instant case.

Petitioners are simply wrong in their argument that the ruling of the Court below is in any way inconsistent

with the pronouncements of this Court. In *Permalife Mufflers v. International Parts*, 392 U. S. 134, 20 L. Ed. 2d 988, the Court was again dealing with a resale price maintenance case. The violation was found when International Parts and its wholly owned subsidiary, Midas, Inc., imposed price restrictions on independent dealers operating Midas Muffler shops. The relationship between the two corporations was not at issue, but rather their efforts to remove the discretion of dealers was found to be a violation of Section 1 of the Sherman Act. There is nothing in the holding in *Permalife, supra*, which is inconsistent with the ruling of the Court below.

Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U. S. 211, 95 L. Ed 219 (1951) is not in any way inconsistent with the decision of the Court below. *Kiefer-Stewart* is also a resale price maintenance case, and it was the attempt to coerce wholesalers to abide by restrictions imposed by Seagram which was found to be illegal. Interestingly, there was no argument that any agreement between the parent corporation and its subsidiary concerning the price the subsidiary would offer its product to wholesalers would constitute a violation of antitrust laws. Petitioners select unrelated attributes of cases with markedly different facts and allegations in an attempt to find some reason for this Court to grant review. Even a cursory reading of those opinions, however, shows that there is no inconsistency with the ruling of the Court below. Differing results based on disparate factual situations do not create either a conflict in legal standards or any inconsistency with the standards as expressed by this Court. Petitioners' attempt to seek this Court's review is unwarranted.

3. Petitioners' Assertion that There is Little Price Competition Within the Real Estate Industry Ignores the Effect of their own Argument and is Irrelevant to the Issues at Hand.

Petitioners' assertion concerning the real estate industry in general is completely irrelevant and was not an issue in the Trial Court. Because this issue is irrelevant, there was not a record made in the Trial Court as to price competition within the real estate industry. It is therefore submitted that this issue should not be considered by the Court in its decision herein.

The Petitioners ignore the effect of their own argument. If Moore and Company and its own sales agents are distinct and separate entities capable of conspiracy under Section 1 of the Sherman Act, 15 U. S. C. § 1, Moore and Company would be completely precluded from using sales agents who are not employees. Moore and Company would violate the antitrust laws by any direction given to its sales agents. It could not direct sales agents to maintain offices in a particular part of the State of Colorado or the City and County of Denver as any such agreement between "competitiors" would be an unlawful territorial allocation. Every meeting between management of Moore and Company and a sales agent would involve a potential antitrust violation. Acceptance of Petitioners' position herein would not enhance competition in the real estate industry, but rather would completely eliminate one form of business organization without any economic justification. Even a limited examination of the consequences of Petitioners' position reveals that it has no logic and should be rejected.

THE DIRECT BENEFIT EXCEPTION IS NOT APPLICABLE

Petitioners' attempt to bring this case within the "direct benefit exception" involves misapplication of the undisputed facts of this case to the necessary factual predicate of that exception. In order for the exception to apply as enunciated by the only circuit which has accepted it, there must be three entities: first, the corporation; second, the officer or employee acting for that corporation; and third, a separate corporation or entity in competition with the first corporation in which the officer or employee has an independent personal interest. An examination of the one case adopting this theory, *Greenville Publishing Co. v. The Daily Reflector,* 496 F. 2d 391 (4th Cir. 1974) quickly reveals its inapplicability to the undisputed facts of this case. The Court held that there could be a conspiracy where Mr. Whichard, president of defendant Daily Reflector, was also affiliated with the Ayden News-Leader, which would also benefit by the restraint of trade eliminating competition from the plaintiffs. Thus, there were two distinct entities necessary for an antitrust conspiracy, and the officer was held to be a co-conspirator because of his financial interest in both the entities which had conspired to eliminate the plaintiff. The Court below correctly held that this unique exception is vastly different from the undisputed facts of the instant case.

Perhaps the clearest statement of why the "direct benefit exception" is inapplicable to the case at bar is found in the holding of *H & B Equipment Co. v. International*

Harvester, 577 F. 2d 239, 244 (5th Cir. 1977) relied upon by Petitioners. The Court held:

> In the cited cases, the employees had interest in economic entities separate from the principal defendant. . . . Without such an organization legally distinct from the principal defendant, it would be impossible for an employee to have an interest that was truly independent.

Every employee who is paid by commission has an interest in that commission. That interest, however, is not an *independent* interest necessary for application of this limited exception. Whatever the applicability of the "direct benefit exception" it is clear that it has no application here.

CONCLUSION

It is submitted that the Petition for a Writ of Certiorari should be summarily denied. Review of the decision of the Court below would necessarily involve interpretation of state law, and deference should be given to that interpretation both by the Colorado Supreme Court and by the lower federal courts sitting within that state. There are no special and important reasons to grant review herein. The legal standards applied by the circuits are not inconsistent, nor was the decision below inconsistent with any rulings of this Court. This Petition is but a meritless conclusion to frivolous and vexatious litigation. It is submitted that pursuant to Supreme Court Rule 50, this is

an appropriate instance for the Court to adjudge double costs against Petitioners.

DATED this 29 day of September, 1983.

Respectfully submitted,

JAMES M. LYONS*
JAMES R. EVERSON
ROTHGERBER, APPEL & POWERS

1600 Broadway, 24th Floor
Denver, Colorado 80202
Telephone: (303) 861-2600

Attorneys for Respondents

* Attorney of Record

APPENDIX 1

Ogilvie v. Fotomat Corp.
641 F. 2d 581 (8th Cir. 1981)

The corporation did not conspire with its wholly owned subsidiary.

Photovest v. Photomat Corp.
606 F. 2d 704 (7th Cir. 1979) cert. denied 445 U. S. 917 (1980)

The corporation could not conspire with its wholly owned subsidiary based on the facts of that case.

Las Vegas Sun v. Summa Corporation
610 F. 2d 614 (9th Cir. 1979) cert. denied 100 S. Ct. 2988 (1980)

No conspiracy was found where the separate entities were operated as one economic unit.

Harvey v. Fearless Farris Wholesale
589 F. 2d 451 (9th Cir. 1979)

Separate corporations were found not to have conspired with the owner who made the decision in question.

Hardwick v. Nu-Way Oil Co.
589 F. 2d 806 (5th Cir. 1970)

An independent contractor gas station operator was found to be little more than a salaried employee.

H & B Equipment Company v. International Harvester
577 F. 2d 239 (5th Cir. 1978)

A manufacturer could not conspire with its unincorporated and wholly owned retail outlet.

Mutual Fund Investors v. Putman Management
553 F. 2d 620 (9th Cir. 1977)

No conspiracy was found between vertically integrated subsidiary corporations.

Knutson v. Daily Review, Inc.
548 F. 2d 795 (9th Cir. 1976)

Evidence that a parent corporation and its subsidiary were a single business unit was found to support a factual finding of no conspiracy.

Edwin K. Williams & Co. v. Edwin K. Williams
542 F. 2d 1053 (9th Cir. 1976)

Territorial restrictions between a trademark and copyright licensor and its licensee were found not to constitute violations of the antitrust laws.

Morton Buildings of Nebraska v. Morton Buildings
531 F. 2d 910 (8th Cir. 1976)

Acts done between a corporation and its officers or agents were found not to constitute a conspiracy in violation of the antitrust laws.

Evans v. S. S. Kresge
544 F. 2d 1184 (3rd Cir. 1976)

Restrictions on retail prices of an independent food store operator using a department store's trade name in a food store adjacent to the department store were found not to constitute a violation of the antitrust laws as the two entities were not in competition.

Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors
416 F. 2d 71 (9th Cir. 1969)

Divisions within a corporation could not conspire with each other or the corporation.

Reins Distributors v. Admiral Corporation
256 F. Supp. 581 (S. D. N. Y. 1966)

A parent corporation and its subsidiaries were held not to be separate entities for purposes of the Robinson-Patman Act.

• • •

The following treatises and articles have discussed this issue:

P. Areeda, *Antitrust Analysis*
para. 338 (2nd edition 1974)

Handler, *Twenty-Five Years of Antitrust*
73 Colum. L. Ev. 415, 452-53 (1973)

Handler, *Through the Antitrust Looking Glass*
21st Annual Trust Review
57 Calif. L. Rev. 182, 182-86 (1969)

Willis and Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*
43 N. Y. U. L. Rev. 20 (1968)

McQuade, *Conspiracy, Multicorporate Enterprises* and Section 1 of the Sherman Act
41 Va. L. Rev. 183 (1955)

Note, Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act
75 Mich. L. Rev. 717 (1977)

Comment, All in the Family: When Will Internal Discussions be Labeled Intra-Enterprise Conspiracy?
14 Duq. L. Rev. (1975)